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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 383

RUSSELL G. COFER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONER

PEYTON FORD
1000 Connecticut Avenue
Washington 6, D. C.
Attorney for Petitioner

Of Counsel:

FORD, MARSON, GREENE AND HORAN
1000 Connecticut Avenue
Washington 6, D. C.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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RUSSELL G. COFER, *Petitioner*

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REPLY BRIEF FOR PETITIONER

Respondent (the United States) in its Brief in Opposition has chosen to realign and restate petitioner's Questions Presented in such a way as to obscure its failure to fairly meet, contest or refute the

principle argument advanced by petitioner[1] that a denial of the fundamental guarantees of the Fourth and Fifth Amendments to the Constitution of the United States results from the admission in evidence of an incriminating statement (tantamount to an admission of guilt) made by the accused solely as a prerequisite for standing to invoke the rule of exclusion of the *Weeks* case to suppress evidence allegedly obtained through an unlawful search and seizure.

1. Petitioner in its argument placed the holding of the case of *Fowler* v. *United States* (CA 10, 1956) 239 F. 2d 93 (and the authorities relied upon therein),[2] that a motion to suppress if overruled may be used as an admission at the trial, squarely in issue. Respondent answers petitioner's objections to the principle enunciated by the cases of the *Fowler* line by the simple expedient of reciting the rule and citing the cases under attack. That very technique of blind adherence and refusal to explain, analyze or justify is in character with the growth of the principle in these cases.

Respondent justifies this treatment on the grounds that use of the admission, in view of other evidence

[1] The Brief in Opposition does respond to the second question which petitioner raises, i.e., the applicability of Section 1262 of Title 18 U.S.C. to the State of Oklahoma, and therefore petitioner does not elaborate on that question in this Reply. Petitioner's contentions with respect to that question are set forth at pages 17-19 of the Petition.

[2] See page 12 of the Petition citing Heller v. United States (CA 7, 1932) 57 F. 2d 627, cert. den. 286 U.S. 567; Kaiser v. United States (CA 8, 1932) 60 F. 2d 410, cert. den. 287 U.S. 654; Vaught v. United States (CA 9, 1925) 7 F. 2d 370; United States v. Lindsly (E.D. La., 1925) 7 F. 2d 247, rev'd on other grounds (CA 5, 1926) 12 F. 2d 771.

allegedly linking the petitioner with the automobile and contraband liquor, was "nonprejudicial surplusage". Even if such a characterization has merit, although petitioner earnestly asserts that it does not, this Court, in cases involving fundamental constitutional rights, has swept aside the judicial cure-all of "harmless error" and given full effect to constitutional guarantees. *Bram* v. *United States* (1897) 168 U.S. 532; *Lyons* v. *Oklahoma* (1944) 322 U.S. 596; *Malinski* v. *New York* (1945) 324 U.S. 401; *Grunewald* v. *United States* (1957) 353 U.S. 391 reversing 233 F. 2d 556. Cf. *Stein* v. *New York* (1953) 346 U.S. 156. Judge Frank (dissenting in part) in the Court of Appeals decision in the *Grunewald* case, *supra*, admonished that "Such an error [the invasion of a constitutional right] cannot be deemed harmless." 233 F. 2d at page 578.

2. While it is petitioner's contention that in order to secure the practical as well as theoretical guarantees of the Fourth and Fifth Amendments admissions of proprietary or possessory interest requisite for standing to attack search and seizure methods should be excluded from evidence regardless of the ruling on the motion to suppress, petitioner does not thereby express approval of the standing rule itself.[3] To the contrary, petitioner, recognizing that fairly comprised within the first question presented is the ques-

[3] The so-called standing rule, requiring one who challenges the legality of a search and seizure assert either a proprietary or possessory interest in that which was seized and sought to be introduced in evidence, has become the general rule in the federal courts (Pet. p. 9 and Br. in Opp., note 2). This Court has not explicitly passed on the requirement. *Goldstein* v. *United States* (1942) 316 U.S. 114, 121; and see *McDonald* v. *United States* (1948) 335 U.S. 451, 456; *United States* v. *Jeffers* (1951) 342 U.S. 48.

tion of the validity of the standing rule, joins with those who condemn that rule.

Attacks upon the standing rule have been frequent and vehement. One writer has declared it to be "the most devitalizing force" in limiting the doctrine of the *Weeks* case.[4] The most recent protest against this devitalization is found in the Court of Appeals for the District of Columbia Circuit in the opinion of Judge Bazelon (dissenting) in *Christensen* v. *United States* No. 14377 decided August 28, 1958 where it is said:

> ". . . Where it is clear from the circumstances that the defendant's constitutional right to be free from unreasonable search and seizure has in fact been violated, a requirement that, as a condition to excluding the product of the search, the victim must affirmatively admit possession of the article, which in the case of contraband amounts to confessing guilt, is an obvious, even if not avowed, abandonment of *Weeks*. We place the victim of the search upon the horns of a dilemma. If he does not claim possession of the seized contraband, we allow it to be used in evidence against him. If he does claim possession of the contraband, we let his own claim convict him."[5]

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[4] Grant, *Circumventing The Fourth Amendment* (1941) 14 S. Cal. L. Rev. 359, 368.

[5] Petitioner submits that an accused victimized by a *clearly unreasonable* search and seizure has little objection to the standing rule if the case of *Safarik* v. *United States* (CA 8, 1933) 62 F. 2d 892 (citing *Silverthorne Lumber Co.* v. *United States* (1920) 251 U.S. 385) is followed. However, the language quoted is as apropos to the more subtle problem posed when the ruling on a motion to suppress cannot be predicted with certainty. See *Christensen* v. *United States, supra* note 9.

Judge Bazelon argues that inquiry into the proprietary interest is logical only in cases involving third party interest in the property seized and would limit the scope of the standing rule accordingly. Petitioner offers the alternative approach, exclusion from evidence of motions to suppress regardless of the ruling thereon. Either approach would effectively remedy the situation in which an accused is forced to gamble with his right against self-incrimination or forsake the protection of the *Weeks* doctrine.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

PEYTON FORD
1000 Connecticut Avenue
Washington 6, D. C.

Attorney for Petitioner

Of Counsel:

FORD, LARSON, GREENE AND HORAN
1000 Connecticut Avenue
Washington 6, D. C.